United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2499

To be Argued by
DEYAN RANKO BRASHICH

In The

United States Court of Appeals

For The Second Circuit

ORIGINAL

WINSTON E. KOCK, JR.,

Plaintiff-Appellee,

vs.

THE BRUNSWICK CORPORATION,

Defendant-Appellant.

Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLEE

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PRELIMINARY STATEMENT

This is an appeal by defendant-appellant, The Brunswick Corporation ("Brunswick") from a judgment of the District Court for the Southern District of New York (Frankel, D.J.) in favor of plaintiff, Winston E. Kock, Jr. ("Kock"), in the amount of $79,464.78, after trial before a Court and jury.

ISSUES PRESENTED FOR REVIEW

1. Did Kock have to establish ability and willingness to perform after Brunswick's repudiation and notification of its intention not to further perform under the contract, especially in light of Brunswick's act which effectively frustrated any possible future performance by Kock?

The Court below ruled in the negative.

2. Did Kock have to prove his damages as reasonable, in light of Brunswick's own reliance thereon at trial on the counterclaim, and in light of the applicable New York rule for measure of damages in breach of contract disputes?

The Court below ruled in the negative.

3. Can Kock recover prospective damages, being precluded from a judgment of indemnification, said damages being sums due advertisers to which Kock admitted liability?

The Court below ruled affirmatively.

STATEMENT OF FACTS

Brunswick for a number of years prior to January, 1972, was the owner and operator of approximately two hundred bowling centers throughout the United States. Prior to 1972, Brunswick had an arrangement for the supply of score sheets to its bowling centers with Walt Peabody Advertising, Inc., hereinafter Peabody, initially a named defendant in the Court below whose dismissal was stipulated to by all parties.

Brunswick's arrangement with Peabody was originally pursuant to a written agreement which lapsed by 1971. Thereafter, the arrangement continued without specific terms and conditions, and in fact Brunswick at the time of trial had no knowledge of its terms and conditions, and more vitally, was unaware of its termination dates (356A, 371A; 404SM).[1] The Peabody score sheet was funded by local advertisers within the immediate area of the local Brunswick bowling center and was produced without any supervision or approval by Brunswick. Brunswick during 1970 demanded of Peabody that a national score sheet be implemented, which Peabody was unable to effect. Peabody and its salesmen and employees for the years it dealt with Brunswick were constant sources of irritation. These difficulties prompted Brunswick to actively engage in seeking a replacement (299SM, 352-354SM; 39A). Peabody was thus far from a generally satisfactory supplier of score sheets, as is now professed (4B)[2], and by February, 1973, had assumed in

1. References to "(A)" are to the Joint Appendix. References to "(SM)" are to the portions of the stenographer's minutes of the trial not included in the Appendix.

2. References to "(B)" are to Appellant's Brief in chief.

Brunswick's eyes the role of a threat and adversary (Exhibit 24; 424SM).

In January of 1972, William Kratzenberg, a Brunswick employee met with Kock and his then associate, Al Tiede. Kratzenberg specified Brunswick's score sheet needs and discussed the difficulties posed by a prototype score sheet submitted by Kock and Tiede. At that meeting Brunswick's ignorance as to the actual terms and conditions of its arrangement with Peabody was withheld since Kock and Tiede were projecting a start-up date far in the future. Kratzenberg's and Brunswick's continued ignorance of the terms of the Peabody arrangment was not disclosed to Kock in August, 1972 nor in November, 1972, and was not disclosed until after the Peabody California breach of contract suit had been unilaterally settled by Brunswick in March of 1973 (347-355A).

Kock having severed his relationship with Tiede in June, 1972, contacted Brunswick and inquired if a national score sheet supplier was still being sought. On June 8, 1972, Kock met Kratzenberg at Brunswick's offices and submitted a proposed contract. Among the specifics discussed, was the termination of the Peabody contract. At that time, Kock submitted certain proposals and was told that the target date for the exclusive use of his national score sheet would be eight months hence, in March of 1973 (48A).

As a result, in June of 1972, Kock contacted numerous advertisers with his proposal, and with Brunswick's approval conducted a Gallup Poll test at one of Brunswick's facilities in New York City. In early August, 1972, Kratzenberg telephoned

Kock and demanded his assurance and commitment that he would in fact supply Brunswick score sheets commencing March, 1973 (56A). In reply, Kock telegramed Kratzenberg and accepted such offer, and committed himself for the delivery of score sheets to be used exclusively in all of Brunswick's bowling centers (Exhibit 56). The Court below ruled that the contract between the parties could have come into existence on that date, and submitted this question of fact to the jury. The jury found that the parties had in fact entered into such an agreement as of August 10, 1972, and not, as appellant now contends to this Court (3B, 6B), on November 27, 1972. The Court below, and the jury rejected this theory, while it was appellant's position in the Court below that the November 27, 1972 agreement was but an agreement to agree *in futuro* (502SM) and again inconsistently asserts this contention on appeal (6B).

It is noteworthy that Kratzenberg on July 20, 1972, wrote Peabody advising that Brunswick was considering Kock's proposal for a national score sheet for 1973, and that Brunswick did not feel committed to Peabody (Exhibit 7). After receiving Peabody's reply dated July 25, 1972, Kratzenberg, on the very date he demanded Kock's commitment, wrote Peabody attempting to elicit the termination dates for the various centers. Even though Peabody responded, Kratzenberg testified that at no time did he receive the information alluded to in the letter of transmittal, nor did he ever contact Peabody to obtain this information (404SM).

Subsequent to August 10, 1972, Kock relying on his agreement with Brunswick embarked on a program to sell national advertisers and incurred various expenses. Appellant

faults Kock for not having a single advertiser in August, 1972 (5B), and but one advertiser in November, 1972 (7B). Inconsistently, appellant, at the trial below, objected to any costs incurred by Kock in furtherance of the agreement prior to November 27, 1972 (170A, 176-185A).

On August 23, 1972, Kratzenberg requested that Kock furnish Brunswick in 1973 with a different type of plastic score sheet, to which Kock agreed on September 11, 1972. In fact, Kratzenberg and Kock were in constant communication (59A) and there was no two month hiatus as appellant now claims (6B).

Brunswick communicated with Kock on October 10th, requesting a status report and further requesting to be assured that Kock had not abandoned his commitment of August 10, 1972. Kock replied on October 12th, voicing his puzzlement as to the inquiry, inasmuch as he was firmly bound to provide Brunswick with score sheets exclusively for all of Brunswick's centers, commencing March, 1973.

Following receipt of the October 12th reply, Kock was invited for a visit to Skokie, Illinois, Brunswick's headquarters. At a meeting held on November 27, 1972, a discussion was had relative to the implementation of the Kock/Brunswick arrangement of August 10, 1972. At that time, Kratzenberg and Brunswick assured Kock that he had the sole and exclusive agreement for the supply of score sheets, inquired as to potential advertisers, and was further assured that Brunswick would simultaneously commence the use, during March of 1973, of the score sheets to be furnished by Kock in all of its bowling centers.

Brunswick, in fact, transmitted this information to Carter Wallace, a future advertiser. During that meeting he was shown a letter dated November 27, 1972 directed to Peabody which read in part:

> "As suggested in our letter to you of July 20, 1972, we have now made arrangements with another service to supply score sheets to Brunswick in its BCO Centers on an *exclusive basis commencing March 1, 1973.*
>
> Accordingly, as requested in your letter of July 25, 1972, *we are hereby giving you notice of the termination of all commitment to use score sheets supplied by you after March 1, 1973."* (Emphasis supplied.)

Inconsistently, Kratzenberg at the trial contended that this was but a means of eliciting Peabody's termination dates, and was not a termination *per se* of the use of Peabody score sheets (415SM). While orally being assured as to Brunswick's intention, Kock was given a letter the pertinent language of which is set forth at Page Six of the Appellant's Brief. Again Brunswick's position at trial was even more inconsistent in view of an internal memorandum authored by Kratzenberg and dated January 24, 1973, directed to all District and Regional Managers, advising of the Kock exclusive arrangement to commence March 1, 1973 (303SM).

On or about January 18, 1973, Kock had secured a firm commitment from a number of advertisers, including the United

States Army, through its advertising agency at Philadelphia, Pennsylvania. Kock had notified Brunswick Regional, District and Center Managers of his exclusive arrangement commencing March, 1973, with Kratzenberg's approval. He was advised by one of Brunswick's employees that Peabody had sent a large shipment of score sheets to a Brunswick center at Camden, New Jersey in close proximity to the Army's advertising agency. Knowing that this would jeopardize his agreement with the United States Army, and knowing that the continued use of Peabody's score sheets subsequent to March, 1973, would be considered a breach of that agreement, Kock immediately advised Brunswick of this fact and requested that this be stopped (83-84A).

Kratzenberg, relieved of his position in early February, was succeeded by Jerry Oles who assumed all of his duties and responsibilities (297SM). Oles, being apprised that Peabody was "flooding" various centers with a great quantity of score sheets, on February 27, 1973, advised all Regional and District Managers that the Peabody agreement had ended December 1, 1972, that they were not to use the Peabody sheets and should they receive any further shipments they were to return them freight collect (304SM; Exhibit 24).

Kratzenberg, who at that time had assumed the position of a District Manager, at the trial admitted receiving this memorandum but in no way responded, nor in any way sought to correct this alleged error.

Although it is asserted both at trial and at appeal that Brunswick intended to live up fully to its obligations to Peabody, it never transmitted this fact to Peabody and on

February 28, 1973, Peabody brought suit against Brunswick and Kock in California alleging breach and seeking injunctive relief. Only Brunswick was served with process. Without consultation with Kock, Brunswick unilaterally settled this action with Peabody pursuant to a certain stipulation dated March 14, 1973 which provided for termination dates of the use of Peabody score sheets through January and February, 1974 (Exhibit 27).

As a result of this unilateral stipulation, Brunswick having been legally coerced to live up to its obligations to Peabody, Kock was faced with a *fait accompli*, having available in March of 1973 but twenty-eight of the two hundred centers promised, a mere 14%. Brunswick, apparently realizing that the Peabody exposure was ultimately financially far greater, and would prove to be an embarrassment to their centers due to continued patronage by local advertisers, elected to breach the agreement of the lesser and weaker of the two evils — Kock.

Kock, in accordance with his agreement in late February or early March, 1973, shipped 2,400,000 paper score sheets and 30,000 plastic score sheets. An additional 2,100,000 paper score sheets and 30,000 plastic score sheets, with different or renewed advertisers were to be delivered in September, 1973. Unable to persuade Brunswick at a meeting on March 26, 1973, to undertake "make-good" offers to his advertisers (99-100A, 156-161A), Kock did not meet with his advertisers realizing his legal obligations, and exposure which continues to exist to today.

Subsequent to a conversation with Oles in late April, 1973, Kock, realizing that Brunswick would not honor his agreement and would not cooperate in effecting a settlement with his

advertisers, instituted these proceedings on May 2, 1973. Concededly, Kock did not contact existing advertisers nor did he pursue contacts with potential advertisers for he could not sell that which he did not have — an exclusive for the 200 Brunswick bowling centers in September, 1973. Brunswick's actions had effectively frustrated and aborted Kock's efforts to sell advertising for the balance of the contract.

Brunswick, on appeal and at trial, took the position that Kock has defaulted in his obligation to furnish additional score sheets. That contention was rejected by the Trial Court and the issue was not permitted to reach the jury. Brunswick, on appeal, further contends that even though it may have been in default under the agreement, and had effectively frustrated performance, Kock had to plead and prove ability to perform independent of its frustrative acts. The Trial Court rejected this argument and these issues are treated in Point I of this Brief.

At trial, Kock presented evidence that he had expended various sums and appreciable time in reliance on the agreement. He testified that he had solicited several printers, and had finally chose a printer — Lasky and Co. — who testified at the trial below. Kock had paid this printer the sum of $48,300 (208A) and had expended, in total, for the period August 10, 1972 to May 2, 1973, the sum of $57,464.78 (491SM). At trial Brunswick's counterclaim, which was summarily dismissed, was presupposed on Kock's proven expenditures, as being reasonable in support of its claim (382-383A). In addition, Kock testified as to his lengthy experience for a number of years in the advertising industry and his earning capacity. The jury awarded a sum which presumably included an award for his time and effort. These issues are treated in Point II of this Brief.

It is conceded that Kock has received the sum of $39,760 from various advertisers, which he did not retain, as appellant asserts (11B), but which sum was expended in furtherance of the agreement. Kock, remains liable to these advertisers under the applicable statute of limitation, Section 213, New York Civil Practice Law and Rules, up to and including March 1, 1979. Kock has stated in open court that he is bound to return the sums so received, assuming a verdict in his favor and an affirmance in this Court, since Brunswick steadfastedly refused to enter into an indemnification agreement (474-478SM). This issue is treated in Point III of this Brief.

THE VERDICT

At the trial, the jury found for Kock in the amount of $79,464.78. No indication was given, except by inference, as to the computation of such award. The Trial Court denied appellant's motion for a directed verdict or for judgment notwithstanding the verdict (452-453A).

ARGUMENT

Point I

Kock fully performed all obligations under the agreement in March, 1973. Brunswick having breached its agreement in March, 1973, may not assert as a defense Kock's failure to perform conditions after the institution of this action. Brunswick, having caused a total breach, and having frustrated Kock's performance can not seek to impose on Kock the burden of proving ability to perform the balance of his contractual obligations.

Appellant infers that Kock is to be charged with total performance under his agreement with Brunswick, *i.e.*, the delivery of 4,500,000 paper score sheets and 60,000 plastic score sheets.

Appellant apparently misconstrues the present situation. Brunswick's actions in unilaterally settling the Peabody suit and advising Kock that it would not honor its commitment, and would not grant him the exclusive right to service all of its two hundred bowling centers, is a material and total breach. 7 Encyclopedia New York Law 1601; *Clark Contracting Co. v. New York*, 229 N.Y. 413 (1920).

When such a material breach, as in the case at bar, is accompanied by a repudiation and an express intention to perform no further under the agreement, the injured party, if he sues at all, must sue for total breach and recover all of his damages, past and future, in one action. See Point III of this Brief.

Appellant places great reliance on *Scholle v. Cuban Venezuelan Voting Trust*, 285 F.2d 318 (2d C.C.A. 1960), where this Court stated that the ". . . party wronged must show, however, that the breach caused his loss. To do this he must prove that he intended to and was able to perform when his performance was due." *Id.* at p. 320. Appellant relies further on *Utifec S.A. v. Trade Bank and Trust Company*, 21 App. Div. 2d 187 (1st Dept. 1964), *affirmed without opinion*, 16 N.Y.2d 698 (1965) and *Strasbourger v. Leerburger*, 233 N.Y. 55 (1922) for the proposition that proof of the ability to complete the performance of a contract, even after breach by the other party, is a requisite condition precedent to recovery in an action for its breach.

Both of these cases relate to anticipatory breaches unlike the case at bar which is a total breach coupled with repudiation and an express intention to perform no further. In an anticipatory breach situation, the promise need not tender his own performance, since the repudiation excuses all conditions to the right to enforce the contract, including the plaintiff's performance or tender. But, the promisee must prove that he had been able and willing to perform at the time fixed for performance had it not been for the anticipatory repudiation. 7 Encyclopedia New York Law 1610; *Rosen v. Greenwald*, 200 App. Div. 499 (1st Dept. 1922).

However, when a promisor is in default or has totally breached the agreement and such breach can not be cured, the promisee may recover without a showing of tender or even of willingness or ability to perform. *Cohen v. MacKranz*, 12 N.Y.2d 242, 246 (1963). Brunswick concededly breached its

agreement by refusing to exhibit and employ Kock's score sheets in its two hundred bowling centers. Its transmittal of the Peabody termination dates up to and including January and February, 1974, clearly showed the intent not to perform under the terms of the agreement, as did the various meetings and conversations between Oles and Kock in March and April of 1973 (99-100A, 156-161A).

Under these circumstances, it is clear that Kock did not have to show either ability or willingness to perform under the terms of the agreement since Brunswick could not cure its breach having entered into the March 14, 1973 stipulation with Peabody. *Greene v. Barrett, Nephews & Co.*, 238 N.Y. 207 (1924).

Alternatively, Brunswick's refusal to grant Kock exclusive score sheet exposure in all of its centers prevented Kock from contacting potential, lucrative advertisers with national reputations who had evinced interest such as "Colgate-Palmolive," "Travelers," "Nabisco," "Gillette," and "Alberto-Culver." Far from being rescued from a losing venture, Kock was on the threshhold of a viable and renumerative enterprise having proven to potential advertisers in March of 1973 that he was in business and had a vehicle which they could employ to display their wares. It was Brunswick's action that effectively prevented and frustrated Kock's performance under the contract.

In that light, Brunswick's reliance on *Utifec, S.A. v. Trade Bank and Trust Company, supra,* is doubly misguided for that Court, per Breitel, J., opened at page 560:

> "An anticipatory breach, in a proper case, may excuse one from performing a useless act, but it does not excuse one from the obligation of proving readiness, willingness, and ability to have performed the conditions precedent. *Nor should one confuse an anticipatory breach by repudiation with an act by the promisor which makes impossible, by frustration, any effort to perform a condition precedent.*" Citing *Cohen v. Kranz, supra,* and see cases and materials cited thereat, emphasis supplied.

It is clear that New York law in a case of total breach, when such breach cannot, nor will not be cured, does not require proof of ability and willingness to perform. Alternatively, New York law requires proof of ability to perform, only in anticipatory breach of contract disputes, and not in cases as the one at bar where the promisor's acts had rendered it impossible by frustration to perform a condition of the agreement. We submit that the Court below properly ruled and the judgment must be affirmed.

Point II

Kock testified and documented that actual costs incurred were in the sum of $57,464.78. On this proof and additional testimony as to his earlier earnings, the jury awarded $79,464.78. The applicable measure of damages for breach of contract is the loss sustained or gain prevented at the time and place of breach and not the reasonable value of such expenditures.

The District Judge instructed the jury that if it found that there was an agreement and if such agreement had been breached by Brunswick, then the measure of Kock's damages was the amount of money and the value of his time and effort expended from August 10, 1972 through May 2, 1973, in reasonable reliance, imminent expectation, and performance of the contract. Kock proved and documented total monetary expenditures of $62,264.78, from which the sum of $4,800, representing the cost of defective plastic score sheets, was deducted at the direction of the Court (409-410A), leaving a balance of $57,464.78. The jury verdict, $22,000 in excess of this sum, was based presumably on its determination of the value of Kock's time and effort.

At trial, Kock withdrew any claims for loss of prospective profits since it is well settled that an award of damages may not be had where there is no certainty of proof as to the amount, and where loss of profits are completely speculative as realization of benefits from a new and untried venture depending on many uncertainties, and especially where there exists no comparative data to show profitability. *Mechanical Wholesale, Inc. v. Universal Rundle Corp.*, 432 F.2d 228 (C.C.A. 5 1970);

St. Paul at Chase Corp. v. Manufacturers Life Insurance Co., 262 Md. 192, 278 A.2d 12 (1971), *cert. denied*, 404 U.S. 857; see also "lost profits as contract damages: problems of proof and limitations on recovery," 65 Yale Law Journal 992 (1955).

The Trial Court's ruling that Kock could not introduce into evidence Peabody's profits over a several year span as measure of expected profits, precluded claims as to prospective profits.

Being perforce precluded in proving prospective profits at trial, Kock was relegated to the ". . . proper measure of damages for breach of contract determined by the loss sustained or gain prevented at the time and place of breach." *Simon v. Electrospace Corporation*, 28 N.Y. 2d 136, 145, 320 N.Y.S. 2d 225, 232 (1971). See cases and materials cited thereat.

Cases cited by appellant, *Farrell v. Klapach*, 24 App. Div. 2d 590 (2d Dept. 1965); *Lichtermann v. Barrett*, 157 N.Y.S. 882 (App. T. 1st Dept. 1916); *Adair v. Young*, 205 N.Y.S. 2d 463 (Sup. Ct. Schenectady Co. 1959) are clearly distinguishable for they deal with injury to property in a tort situation, where a reasonable cost of repairs and replacement test has been mandated. *Adair v. Young, supra.*

Yet, damages in a breach of contract action do not require such "reasonable" test for, in fixing damages for breach of contract, the object is generally to compensate or to indemnify, and any damages flowing ordinarily and naturally from the breach are recoverable. *New York Water Service Corp. v. City of New York*, 4 A.D. 2d 209 (1st Dept. 1957). Cases cited by appellant at page 17 of its Brief are thus clearly distinguishable and inopposite.

Alternatively, it is respectfully submitted, that Brunswick, in support of its own counterclaim which was summarily dismissed (382-383A), sought to employ Kock's adduced and documented expenditures. We submit that such reliance estops Brunswick from now asserting, on appeal, that such sums were unreasonable.

In any event, we submit that any expenditure made by Kock in reliance on the agreement are recoverable. *Fairchild Stratos Corp. v. Siegler Corp.*, 225 F. Supp. 135 (D.C. Md. 1963). Expenditures which are fairly proven, including cost of labor are recoverable, *Randall-Smith, Inc. v. 43rd Street Estates Corp.*, 17 N.Y.2d 99 (1966), and certainly Kock's eight year experience in advertising and his uncontroverted testimony as to his prior earning capacity was adequate to support the jury award in excess of the proven sums expended.

Point III

A judgment of indemnification being unavailable, Kock must recover all items of pecuniary loss, future as well as past, present as well as prospective.

Kock did in fact receive the sum of $39,760 from advertisers which he expended in reliance of his agreement with Brunswick. At trial he did not contend that he was entitled to retain these sums (23B), but rather admitted a breach on his part vis-a-vis advertisers and sought a judgment in the form of indemnification. The District Court Judge, without the presence of the jury, suggested that an indemnification agreement between the parties would be in order. Thereupon, Kock

formally offered to enter into such an agreement (475-480A) which was rejected by Brunswick's counsel. If in fact Kock's obligations to advertisers were merely theoretical and unfounded speculations, as appellant would have this Court now believe (26B), it is submitted that Brunswick would have readily agreed to indemnify Kock. Rather, we suggest, that Brunswick at the trial below was fully aware of Kock's liability and exposure to advertisers and wished to avoid, at all costs, any responsibility to Kock on this regard.

In passing, we note that Kock and this trial counsel affirmatively advised the Court below that in the event of recovery he was obligated to advise his advertisers of the outcome of this litigation and refund the sums in question (474-475A).

Appellant correctly points out that Kock's remedy at trial was not one of indemnification, and the Court below so ruled. Appellant further rightfully contends that Kock was required to present to the Court and jury all items of pecuniary loss, future as well as past, present as well as prospective, so that his damages would be determined in one action. *Park v. Hubbard,* 198 N.Y. 136, 139 (1910). In this context, it is submitted, that Kock's very real and not imagined future liability to advertisers was a proper item of damages considered by the jury.

It is clear that Kock's relationship to advertisers was contractual in nature, and any breach thereof would be governed by Section 213, New York Civil Practice Law and Rules. Perforce Kock remains liable to advertisers up to and including March 1, 1979, four years hence. A mere two years have elapsed

from the time of Brunswick's breach, and advertisers may rightfully seek a recovery for an additional four years.

The District Court Judge, we submit, correctly assayed Kock's position in stating:

> "Now I am not going to send a plaintiff out of here with a verdict from which the jury deducts $40,000 and have those advertisers tomorrow say now that you got the money, we want our money back" (475SM).

and:

> "So here is my situation: He may recover a verdict from which the jury has deducted $40,000 because he has the money and he hasn't paid it back. Next week he may have to pay it all back. It looks to me as though he will have to pay it back if anybody sues him for it. I am not going to leave him in that position" (476SM).

To preclude Kock from recovering the sums advanced by advertisers without a termination of his obligations to them would place Kock in an untenable position. Should this Court accept appellant's position, Kock would and could be forced in the immediate future to repay the sums received from advertisers, without any contribution from Brunswick. That, we submit, would be a patent injustice.

Alternatively, Brunswick would be unjustly enriched by having consumed 2,400,000 paper score sheets and 30,000 plastic

score sheets, not having used them in accordance with the agreement and in addition, having Kock personally defray $39,760 thereof.

Finally, we submit the evidence submitted to the jury — the nature and the terms of Kock's agreements with advertisers, his breach thereof and his admission of liability — can and should sustain their verdict.

CONCLUSION

The judgment below should be affirmed with costs and disbursements. Kock did not have to prove ability in view of Brunswick's acts which frustrated performance. Nor did Kock have to prove the reasonableness of his expenditures in light of Brunswick's reliance thereon.

Kock must recover all past and future, present as well as prospective damages in this action, including sums due advertisers.

Dated: New York, New York
March 1, 1975.

Respectfully submitted,

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Attorneys for Plaintiff-Appellee

DEYAN RANKO BRASHICH
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WINSTON E. KOCK, JR.,

Plaintiff-Appellee,

against

THE BRUNSWICK CORPORATION,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.: New York

I, Victor Ortega, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1027 Avenue St. John, Bronx, New York

That on the 5th day of March 1975 at 245 Park Ave., New York, N.Y.

deponent served the annexed Brief upon

Blumberg, Singer, Ross, Gottesman & Gordon

the Attorneys in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 5th day of March 1975

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413955
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1976